Nos. 18510 to 18519, 18521 to 18531, and 18533

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

JANICE WIENER, *et al.*; UNITED AIR LINES, INC.,

Appellees.

OPENING BRIEF OF APPELLANT UNITED STATES OF AMERICA.

(Appendix in Separate Volume)

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

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Preliminary Statement.

As a preliminary statement, the Court is respectfully referred to the Opening Brief of Appellant United Air Lines, Inc., beginning at page 1, where, as a preliminary statement, the litigative history and present posture of the several cases now before this Court are described. The Government is in accord with the representations made in such preliminary statement. Appeals by the Government are concerned only with the 22 cases described therein as the "nongovernment employee cases".

In addition, the Government is in accord with the method adopted by Appellant United Air Lines, Inc. making specific record references and abbreviations, all

as set forth beginning on page 3 of United's Opening Brief. The Government will use in its briefs the same method for reference to the records in all cases, and the reporter's transcript.

For the convenience of the Court, Consolidated Findings of Fact and Conclusions of Law [R. 2528-2552] are contained in the separately-bound appendix to the Government's Opening Brief, and are therein designated "Appendix A".

Jurisdiction.

Jurisdiction of the trial court as to the claims of the several plaintiffs against the United States and the cross-claim of defendant-appellee United Air Lines, Inc. against the United States was based upon the Tort Claims Act, Title 28, §§1346(b), 2671, *et seq.*

Jurisdiction of the trial court as to the cross-claim of defendant-appellant United States of America against defendant-appellee United Air Lines, Inc. for indemnity or contribution was based upon Title 28, §1345.

Jurisdiction in this Court as to the judgments recovered against the Government by the several plaintiff-appellees, and as to the judgment against the Government in favor of United Air Lines, Inc., allowing contribution, is invoked under Title 28, §1291, on the ground that all such judgments are final decisions of the trial court.

The jurisdictional facts pertaining to the foregoing and record references in support thereof are set forth, with particularity, in Appendix F, to which the Court's attention is respectfully drawn.

Statement of the Case.

1. Facts.

Actions by the plaintiffs in the District Court were based upon a mid-air collision of a United Air Lines, Inc. passenger plane and a Government-owned jet fighter plane. It occurred on April 21, 1958 at approximately 8:30 a.m. near Nellis Air Force Base, Nevada. The collision occurred during daylight; the skies were clear and visibility was excellent. [F. 18.]

All of the actions are based upon the Nevada Wrongful Death Statutes* and are directed against both the United States of America and United Air Lines, Inc. as co-defendants.

The Government plane involved was based at Nellis Air Force Base, and was flown, at the time, by two pilots from the same base. The aircraft involved had dual controls. One pilot was an instructor, who occupied the forward seat in a position to maintain visual lookout. The other pilot was undergoing instruction and occupied the rear seat under a hood. At the time of the collision, they were engaged in the performance of a pre-established training exercise designed to familiarize the pilot in the rear seat with the characteristics of flight of the F-100 Super Saber Jet during an approach by instruments (simulated at the time) to Nellis Air Force Base over a prescribed pattern (KRAM). [FF. 16, 17.]

Nellis Air Force Base is located on the northeasterly edge of Las Vegas, Nevada. Air Force jet fighter training activities conducted therefrom covered an area of approximately 40,000 square miles and had been

*Nevada Revised Statutes Sections 12090, 41080, 41090.

heavy and continuous for more than six years prior to the date of the mid-air collision involved here. [F. 71.]

United's plane was on a regularly-scheduled flight from Los Angeles to New York City with intermediate stops at Denver, Colorado, Kansas City, Missouri, and Washington, D.C. It was in flight at 21,000 feet, flying along an airway established by the Civil Aeronautics Authority and designated as Victor 8. Prior to departure from Los Angeles, it had filed with the Civil Aeronautics Authority an IFR (instrument flight rules) flight plan describing planned routes, altitudes, and time schedules for the transcontinental flight, which flight plan was approved as to route, altitude, and time by the Civil Aeronautics Authority. [F. 12.]

The training mission being flown by the Air Force pilots was so designed that part of the flight was into and through Victor 8 airway. [F. 47a.] Thus, the collision occurred within Victor 8 airway at about 21,000 feet and approximately 16 miles southwest of Nellis Air Force Base. The occupants of both planes were killed including forty-two passengers and five crew members on the United plane and two Air Force pilots.

After commencement of the actions by plaintiffs, each defendant cross-complained against the other for indemnity, or, in the alternative, contribution in the event either should be found liable to plaintiffs. The District Court denied indemnity to each defendant [Concl. law XVI] and, in the alternative, adjudged that each defendant was entitled to contribution from the other. [Concl. law VII.]

2. Questions Involved—Manner in Which the Same Are Raised.

Questions presented by the appellant United States of America to this Court are, in the main, directed to findings and conclusions of the District Court. The findings and conclusions involved and challenged on this appeal are specifically referred to in the separate phases of Argument. The questions were raised below in the Government's Contentions of Fact and Law. [R. 1359; 1411; 1492.]

(1) Whether the District Court erred in finding and concluding that acts and omissions of the Commanding General of Nellis Air Force Base, and his subordinates, characterized by the District Court as negligent, are within the Tort Claims Act, and outside of the "discretionary function" exception thereto in Title 28, §2680(a). [F. 81; Concl. Law VI.]

(2) Whether there is any evidence in support of the District Court findings of negligence on the part of the Nellis Command in the establishment and use of certain designated airspace for simulated instrument-approach training and the manner in which operations were conducted therein.

(3) Whether the District Court erred in finding and concluding that certain acts and omissions of officials of the Civil Aeronautics Authority, characterized by the District Court as negligent, were within the Tort Claims Act and outside the exceptions in Title 28, §2680(a) (discretionary function) and §2680(h) (misrepresentation).

(4) Whether the District Court erred in finding and concluding that the Air Force pilots negligently failed to see and avoid United's passenger plane.

(5) Whether the District Court erred in finding and concluding that the Air Force pilots were negligent in having their speed brakes retracted at the time of the mid-air collision.

(6) Whether the District Court erred in two cases, in limiting the amount of contribution by United Air Lines, Inc. in favor of the Government to an amount not in excess of the jury verdict in each case.

Specification of Errors.

(1) The District Court Erred in Finding That Official Acts of the Nellis Command of Nellis Air Force Base Were Within the Federal Tort Claims Act and Outside the "Discretionary Function" Exception Thereto.

(2) The District Court Erred in Finding Nellis Command Was Negligent in the Establishment and Use of KRAM and Negligent in the Manner That Operations Were Conducted Thereon, on the Ground That the Only Reasonable Conclusion to Be Drawn From the Evidence Is That Nellis Command Was Not Negligent as Found by the Trial Court.

(3) The District Court Erred in Finding That Omissions by Officials of the Civil Aeronautics Authority Were Within the Federal Tort Claims Act and Outside the Discretionary Function Exception Thereto.

(4) The District Court Lacked Jurisdiction Under 28 U.S.C.A. Section 2680 (h), "Misrepresentation," to Predicate Government Liability on Negligent Failure to Inform United Air Lines of the Existence and Utilization of KRAM.

(5) The District Court Erred in Finding the Government Pilots Negligently Failed to See and Avoid by Yielding the Right of Way to the United Plane, and That Said Failures Were Concurrent and Proximate Causes of the Accident, on the Ground That the Only Reasonable Conclusion to Be Drawn From the Evidence Is That the Government Pilots Were Not Negligent in Any Regard.

(6) The District Court Erred in Finding That the Government Plane's Speed Brakes Were Retracted and Should Have Been Extended at the Time of Impact, and That This Was a Concurrent Proximate Cause of the Accident, on the Grounds That Either the Evidence Was Insufficient to Support the Finding or the Evidence Compelled a Contrary Conclusion.

(7) The District Court Erred in Two Cases in Limiting the Amount of Contribution by United Air Lines, Inc., in Favor of the Government to an Amount Not in Excess of the Jury Verdict in Each Case.

ARGUMENT.

I.

The District Court Erred in Finding That Official Acts of the Nellis Command of Nellis Air Force Base Were Within the Federal Tort Claims Act and Outside the "Discretionary Function" Exception Thereto.

The Commanding General of Nellis Air Force Base and his subordinates are sometimes referred to herein as Nellis Command, conforming to such characterization by the trial court in Finding No. 48.

The foregoing specification of error is directed to twenty-two separate findings by the trial court and Conclusion of Law VI. (Consolidated Findings of Fact and Conclusions of Law [R. 2528-2552] are designated *Appendix A* in the separately bound appendix to this brief.) Twenty-one (of the twenty-two) separate findings fall into two general areas, and for purposes of brevity and orderly presentation, the separate findings have been allocated (as indicated below) to one of two groups, and, as thus grouped, summarized:

> GROUP A: that the Nellis Command was negligent in the establishment and continued use of the instrument-flight-training procedure known as KRAM [FF. 28, 47, 48, 49, 50, 51, 53, 55, 56, 60, 61, 67, 68.];
>
> GROUP B: that having established the KRAM procedure, the actual use, or conduct of operations thereon, by Nellis Command was negligent. [FF. 26, 27, 29, 30, 52, 54, 66, 69.]

The foregoing twenty-one findings of specific negligent acts and omissions are found by the trial court

to be within the ambit of the Tort Claims Act and outside the "discretionary function" exception thereto in Finding No. 81 and Conclusion of Law VI.

For purposes of clarification of terms and phrases as a preface to argument on both of the foregoing groups, the Court's attention will first be drawn to the instrument-flight-training procedure at Nellis Air Force Base known as KRAM.

It is common knowledge that a pilot must, under certain weather conditions of limited visibility, place sole reliance on instruments for guidance of the aircraft in the approach to an airport runway.

Commercial aircraft and pilots of smaller craft oftentimes avoid such instrument approaches by using facilities at other airports in the vicinity or at greater distances. On the other hand, pilots of combatant military planes must, under the exigencies of their military mission, be prepared to engage efficiently in military flying operations from a single airfield under all conditions, including conditions requiring instrument guidance of the aircraft. [Rep. Tr. 2521.] Considering the displacement and transfer of aircraft or crews from one area to another, it is apparent that a uniform instrument-approach procedure would have been standardized for use at all air fields by both military and civilian aircraft. Accordingly, through the joint effort of all military arms and the Civil Aeronautics Authority, standard instrument-approach procedures were developed and published in a booklet entitled "United States Manual of Criteria for Standard Instrument Approach Procedures,". [Ex. G-4.] Section 2.03032 of that manual is designed for instrument approach of high speed jet aircraft, such as the F-100 series Air Force jets

based at Nellis Air Force Base, and is described as "Teardrop Procedure Turn—High Speed Aircraft".

Briefly stated, the aircraft is guided in making the instrument approach by a radio-transmitting station facility having a fixed ground location as a base or starting point. In making such an approach, the path of the aircraft, if drawn on the ground, as it passes over the radio-transmitting station, loses altitude, and flies in an arc toward the runway, would resemble the shape of a teardrop. The teardrop-pattern procedure is standard procedure used by Air Force pilots at Air Force bases throughout the world. [Rep. Tr. 1090-1098; 4426-4428.] The teardrop pattern procedure itself is simply adapted in terms of altitude and directional approach to meet conditions of the local flying area. Accordingly, the training of pilots under simulated conditions for instrument approaches is an *integral* and *necessary* segment of the mission of the Air Force. [Rep. Tr. 1090-1; 2524.]

The Nellis Command, in establishing such simulated instrument-approach training, predicated the teardrop pattern on commercial radio station KRAM at Las Vegas, Nevada. [F. 19.] Thus, it is referred to in the record, the reporter's transcript, and in this brief as the KRAM procedure, or simply as KRAM. The trial court described the KRAM procedure with particularity in Finding No. 17, and it is depicted in Exhibit U-3. The mid-air collision here involved occurred while Air Force pilots were executing the KRAM procedure under simulated conditions of instrument flight.

The Government contends that instrument-approach training is an Air Force activity initiated at the highest level of the Air Force; that the Nellis Command imple-

mented such activity at Nellis Air Force Base by establishing the KRAM procedure, detailing the specifications of KRAM in conformity with local conditions and scheduling training operations utilizing such procedure; that such implementation required determinations made by the Commanding General of the Nellis Air Force Base, which rested upon the exercise of his judgment or discretion.

Title 28, §2680 (a) referred to herein as the "discretionary function" exception, provides in part:

> "The provisions of this chapter and Section 1346(b) of this Title shall not apply to . . . any claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."

The Government contended at the trial [R. 1594 (pretrial conference order, page 4, folio 6-10)] and contends here that the acts and omissions of Nellis Command in the establishment and continued use of the KRAM-instrument-flight-training procedure and the actual operation thereof, including the actual flight involved in the mid-air collision, constituted the performance by the Commanding General of Nellis Air Force Base of a discretionary function or duty, and is directly traceable to public law enacted by Congress.

The establishment, mission, and composition of the Department of the Air Force is contained in Title 10, United States Code, *Armed Forces,* Subtitle D, Air Force. Those sections of Title 10, Subtitle D, which constitute the legislative foundation for the establishment and use of the KRAM procedure by the Com-

manding General of Nellis Air Force Base are set forth in *Appendix B.*

In response to the responsibilities delegated to him by Congress, and drawing his authority from public law, the Secretary of the Air Force on 13 July 1956 issued an executive order designated "AFR 55-19." [Ex. U-5 (includes amendment thereto), *Appendix C.*] This Order, manifestly, as will be shown, influenced directly the establishment of KRAM, and the conduct of operations thereon.

The Order of the Secretary of the Air Force (Appendix C), enjoined commanders, in the interests of safety and efficiency, to establish local flying areas; to segregate to specific areas therein certain types of local Visual Flight Rules (VFR) flight activities such as instrument-flight training, acrobatics, etc.; and to provide for the control of aircraft within the local flying area flying in weather conditions under VFR (Visual Flight Rules).

As a preface to subsequent argument concerning this particular Order, it is desirable that the Court's attention be respectfully drawn to the fact that Nellis Air Force Base traffic-control personnel were not authorized by the Civil Aeronautics Authority to provide IFR (Instrument Flight Rules) control service, *i.e.,* grant IFR clearances. The Air Route Traffic Control Center (ARTCC) facility having jurisdiction of the Nellis-Las Vegas area was located at Salt Lake City, Utah [Rep. Tr. 5381-5383, 5398]; thus paragraph 5c. of the Order (Appendix C) is inapplicable, and paragraph 5d. applies.

The significance of the Air Force Secretary's Order (Appendix C) does not lie only in its *express* pro-

visions. Equally important are its *unexpressed,* but highly significant, *implications.* Thus, it will be noted, the Order does *not* direct IFR clearances for simulated instrument-approach training at air-force bases lacking IFR service capabilities (Nellis AFB). Furthermore, the Order does not enjoin commanders of such flying bases to determine whether or not IFR clearances should be obtained for simulated instrument-approach flights from an Air Route Traffic Control Center (ARTCC) exercising jurisdiction over the area, and it is obvious that it was within the power of the Secretary of the Air Force to so provide (although it was the judgment of the Commanding General of Nellis Air Force Base that to obtain such IFR clearances would not be feasible [Rep. Tr. 2521-2523]). On the other hand, the Order distinctly provided that simulated instrument-approach training would be in fact conducted under VFR control *without IFR clearances.* (Appendix C, par. 5d.) The indelible impression is that simulated instrument-approach training was an exigent mission of the Air Force.

It is important to immediately recognize the implications to be drawn from the foregoing analysis of the Order. The logical and inescapable conclusion is that simulated instrument-approach training under VFR control *without IFR clearances* was a policy established at the policy-making level of the Air Force, formulated by persons charged with the duty of determining policy; that the policy so adopted was unequivocally expressed by the Secretary of the Air Force in an Order promulgated by him in his official capacity. (Appendix C.) Thus, the finding of the trial court that the establishment of the KRAM procedure by Nellis Com-

mand at Nellis Air Force Base for the conduct of simulated instrument-approach training operations *without* IFR clearances constituted negligence [F. 55] is, in effect, the judgment of the trial court that such training *with* IFR clearances was the better alternative of two policies, either of which may have been implemented by the Air Force.

It can hardly be asserted that all of the factors which the Air Force considered cogent in adoption of the training policy were before the Court when it found, in effect, that the alternative would have been a better course. It is not unreasonable to assume that the Air Force considered and rejected a training policy requiring IFR clearances for *all* simulated instrument-approach-training procedures. This assumption finds firm support in paragraph 5d. of the Air Force Secretary's Order. (Appendix C.) In any event, it was an act of *discretion* to adopt one to the exclusion of the other. In truth, it was the exercise of a "discretionary function" on the part of a federal agency, the United States Air Force, within the meaning of §2680(a), and it was error for the Court to find to the contrary.

In all findings concerned with failure of Nellis Command and its pilots to obtain IFR clearances prior to the use of KRAM, the trial court included the alternate negligent act of failure to obtain traffic information. Predicated on Findings 23, 24, and 25, it is presumed that in all such findings, the trial court meant the obtaining of such information from the Civil Aeronautics Authority. [Compare, for example, F. 54.]

The Government submits that it was the *policy* of the Air Force to conduct simulated instrument approach training without obtaining traffic information from the

Civil Aeronautics Authority at Air Force bases which lacked IFR control service, such as Nellis Air Force Base. The Government equates its position in this regard to its position concerning the "discretionary function" character of the Air Force *policy* to conduct simulated instrument approach training without obtaining IFR clearances at bases lacking IFR control service. The argument in that regard is equally applicable here.

As proof of its contention, the Government points to paragraphs 5.c. and 5.d. of AFR 55-19. (Appendix C.) Paragraph 5.c. (*not* applicable to Nellis) provides for IFR separation from other known traffic insofar as practicable (note that even at bases with IFR control service, separation prevails only *as practicable*), and concludes:

> "IFR traffic will not be delayed because of VFR traffic simulating IFR flight. When necessary, such VFR traffic may be suspended."

The above-quoted two sentences *could have been* included in paragraph 5.d. (applicable to Nellis) *if* air traffic control personnel were, additionally, in the same paragraph, directed to obtain traffic information concerning IFR approved flights from an Air Route Traffic Control Center (ARTCC) of the Civil Aeronautics Authority. Obviously, the Secretary of the Air Force *could have* so provided in AFR 55-19, 5.d. The trial court repeatedly found that Nellis Command, its pilots, and Nellis VFR control personnel *should have* so obtained such traffic information.

Exclusion from paragraph 5.d. of the quoted sentences compels the conclusion that traffic information from the Civil Aeronautics Authority concerning IFR approved flights was not required at Nellis Air Force

Base, and other bases lacking IFR control service, in connection with the control of simulated instrument-approach training as a *deliberate* matter of Air Force policy. The adoption of such policy was the exercise of a "discretionary function" by the Air Force.

It is, in addition, demonstrable that Nellis Command complied with AFR 55-19, paragraph 5.d. by specifically furnishing the traffic information therein required. Resting on the premise that, as a matter of Air Force policy, the obtaining of traffic information from the Civil Aeronautics Authority by Nellis Command was not required, it logically follows that the furnishing of traffic information to pilots, as required by paragraph 5.d., AFR 55-19, refers to *local air traffic* of the activity concerned. It is manifest that Nellis Command fully complied with Air Force requirements in paragraph 5.d. by publication and implementation of Training and Operations Memorandum 51-8 (Appendix E).

Accordingly, those findings of the trial court that Nellis Command and its pilots negligently failed to obtain traffic information from the Civil Aeronautics Authority are wholly untenable.

Apart from the foregoing, and upon consideration of the express provisions of the Secretary of the Air Force (Appendix C), it is apparent that the Secretary's Order imposed upon commanders of flying activities the duty of making a factual analysis and survey of the physical environs surrounding the particular flying activity under his jurisdiction. For example, in order for the Commander to perform the duties imposed upon him by the Air Force Secretary's Order, he must, in accordance with said Order, first survey the area for "populous areas" and "congested airspace", and deter-

mine "control areas" and "control zones". He must locate "prominent landmarks." As a preface to this duty, he must familiarize himself with the nature and extent of air traffic "on civil airways," "at nearby airfields", and "in local flying areas." He must locate "local navigational facilities," and define "outlying facilities."

Based upon the foregoing factual analysis of the topography and airspace surrounding his flying activity, the duty then devolved upon the commander to exercise his *individual judgment* and make a definitive segregation of "the various types of local VFR flying activities, such as instrument training, acrobatics," etc., and "publish local directives" embodying the segregation of areas, which in his *individual judgment* were consonant with the local conditions as he found them.

It is apparent that the Order of the Secretary of the Air Force is general in its application to flying activities and major air commands wherever such flying activity be geographically located, including Nellis Air Force Base. It is significant to note that the Air Force Secretary apparently deemed the matter of sufficient import to ignore the usual "chain of command", and, alternatively, to impress directly upon the commanders of each flying activity, such as the Commanding General of Nellis Air Force Base, the duty of compliance with his Order.

Responding to the Order of the Secretary of the Air Force (Appendix C), and precisely in accordance with its directives, the Commanding General of Nellis Air Force Base published and disseminated an implementing order designated "Wing Supplement-1 to AFR 55-19, 13 Jul 56". [Ex. U-4, *Appendix D.*]

Having been previously directed in a written order by the Air-Training Command to conduct simulated instrument-approach training as a part of the familiarization training of pilots in the F-100 series aircraft [Flying Training Air Force, Regulation 51-34, Rep. Tr. 1833-1839], the Commanding General executed the Air Force Secretary's Order in the light of the factual determinations made by him of the topography and airspace surrounding Nellis Air Force Base. In order to emphasize the direct correlation between the Order of the Secretary of the Air Force and the Order of the Commanding General of Nellis Air Force Base, pertinent portions of both Orders are reproduced here in adjoining columns. The Court is respectfully urged to note with particularity that *Wing Supplement-1* in the right-hand column was drafted in such a manner that it is keyed by direct reference to specific paragraphs of *AFR 55-19* in the left-hand column. The Court will note how the Nellis Command spelled out in detail the local flying area; segregated the various types of local VFR flying (ten different types segregated by Nellis Command); and provided for the control of instrument-training flights, such as KRAM.

AFR 55-19

DEPARTMENT OF
THE AIR FORCE
WASHINGTON,
13 JULY 1956

*AFR 55-19/
WINGSUP-1
HEADQUARTERS
3595th Combat Crew
Training Wing
United States Air Force
Nellis Air Force Base,
Nevada
31 March 1958

OPERATIONS

Control of Local Air Force VFR Air Traffic

PURPOSE: Safe and efficient local Air Force flight operations today depend, in part, upon the manner in which local air traffic is supervised and controlled. This regulation provides guidance for commanders, pilots, and air traffic control personnel for insuring maximum safety and efficiency in their local flying operations.

1. Establishing and Defining Local Flying Areas. The commander having jurisdiction over local flying activities will:

a. Establish local flying area(s) within 100 miles of his base. He will locate the area(s), insofar as practicable, outside populous areas, control areas, and control zones to use the least congested airspace within the 100-mile limit. (When required, the commander of a major air command may authorize the extension of a local flying area beyond the 100-mile limit.)

b. Define each local flying area by indicating prominent landmarks and/or radio fixes. When necessary, he will issue ap-

OPERATIONS

Control of Local Air Force VFR Air Traffic

Air Force Regulation 55-19 is supplemented as follows:

1. See paragraph 1:

a. The local flying area is referenced to the GEOREF grid system. All grid references are prefixed with the EJ basic 15 degree quadrangle.

b. The local flying area extends from: DK0000 to KK0000 to KF0010 to JF 2500 to FF3000 to DG 0057 to DK0000.

c. Lake Mead Base will not be overflown and restricted areas and airspace reservations will be avoided at all times unless on a directed flight. Prohibited area P275 will not be overflown unless authorized by the AEC.

propriate NOTAMS announcing that extensive training is being conducted within given vertical limits and that pilots entering the area(s) must use extreme caution.

2. Operational Control and Supervision. The commander having jurisdiction over local flight operations will:

a. Segregate the various types of local VFR flying activities, such as instrument training, acrobatics, functional check flights, and flight tests, by designating separate areas for each type of activity. . . .

b. Schedule local VFR flight operations in a manner which will minimize congestion and potential air collision hazards.

c. Assign specific altitudes that will provide at least 1000 feet vertical separation to aircraft operating in a designated instrument training area.

2. See paragraph 2a:

a. Instrument training may be conducted in any part of the local area, except the air combat maneuvering area, acrobatic and test area, and gunnery ranges. The area within a 25-mile radius of Nellis Air Force Base is reserved for instrument flying.

b. Acrobatic and primary flight test area extends from [Reference to grid system omitted].

c. Alternate flight test area extends from [Reference to grid system omitted]. This area may be used in the event of adverse weather conditions, etc., in the primary test area.

d. Transition flying area extends from [Reference to Grid System omitted].

e. Close formation flying area extends from [Reference to Grid System omitted].

f. Extended formation flying area (above 26,000 feet) extends from [Reference to Grid System Omitted].

g. Air combat maneuvering area extends from [Reference to Grid System omitted].

h. Sonic boom area is within a radius of 10 miles of GG2510.

(1) Aircraft will approach the sonic boom area from the north at 35,000 feet or above. The dive angle will be 45 degrees or greater and recovery will be completed before reaching 20,000 feet on a heading of south.

i. Supersonic firing will be conducted only within the Restricted Area (R-271).

j. Helicopter test area is located over the grassy area from the Las Vegas Sewage Disposal Plant to point two (2) nautical miles east.

5. Control of Simulated Instrument Flight Rule (IFR) Approaches. The commander, the pilot, and air traffic control personnel are responsible as follows:

a. The *commander* will direct maximum use of outlying facilities in order to relieve air traffic congestion near local navigational facilities.

b. The *pilot,* prior to conducting simulated IFR approaches, will inform

3. See paragraph 5:

a. The procedures for hooded flights during VFR conditions are:

(1) Request for radio range orientation or clearance for penetration will be made to Nellis VFR Control on Channel 15 (363.8 mc) prior to reaching a twenty-five (25) mile radius of Nellis. IFR R/T procedures will be used at all times.

(2) Nellis VFR Control will function primar-

the control tower of his intentions and obtain a clearance. He will monitor the appropriate control frequency throughout and inform the control tower of discontinuance of this activity. At those locations without a control tower, but where there is a communications station, he will contact this facility, state his intentions, request traffic information, and monitor an appropriate frequency. He will inform the communications facility of discontinuance of his activity.

c. (Inapplicable; Nellis Air Traffic Control personnel not authorized to provide IFR Control service; Rep. Tr. 1940; 2424; 5381-5383; 5398)

d. Air Force Air Traffic Control Personnel who are not authorized to provide IFR control service will furnish traffic information to those pilots practicing instrument approaches and advise them to maintain VFR flight.

ily as an approach agency during VFR conditions only. VFR Control will clear aircraft for practice range orientation, assign approach and holding altitudes, establish time separation between flights, and issue clearance for radio range, ADF or DF penetration.

(3) For DF penetration and approach, contact Nellis DF on Channel 14 (305.4 mc) and request practice steer and penetration prior to reaching a radius of twenty-five (25) miles of Nellis, contact Nellis VFR Control on Channel 15 and request an altitude and clearance for letdown, or expected approach time. Return to Channel 14 and advise the DF facility. Report leaving assigned altitude to VFR Control on Channel 15, and other positions reports as required. Minimum altitude for station passage for a DF penetration is eight thousand (8,000) feet.

(4) During normal flying periods the minimum altitude over the low cone will be five thousand five hundred (5,500) feet indicated over the field. Clearance to descent to published minimums must be obtained from the tower

> prior to reaching a point five (5) miles from the field.
>
> (5) Maps showing the local flying area, prohibited and restricted areas will be prominently posted in all locations where aircraft are cleared for flying.

As directed in AFR 55-19, paragraph 7 (Appendix C), the Commander of Nellis Air Force Base disseminated flight information concerning simulated instrument-approach training, including the KRAM procedure, to the Civil Aeronautics Authority at Las Vegas, Salt Lake City, and Los Angeles, as indicated by the signatures of the chiefs of each of the CAA facilities in Exhibit G-10. One of the signers, John A. Garrison, Chief of the Facilities Operations Branch, Los Angeles, testified that his signature on Exhibit G-10 represented that the procedures described therein were consistent with the existing policies of the CAA on April 21, 1958. [Rep. Tr. 2794-2795.] Further, according to Witness Garrison, Exhibit G-10, including details of the KRAM procedure, was disseminated to the Civil Aeronautics Authority, Office of Traffic Control, in Washington, D.C., to the Salt Lake Air Route Traffic Center, and to the McCarran (Las Vegas) tower. [Rep. Tr. 2975.]

Further, copies thereof were transmitted to Hamilton Air Force Base (San Francisco), and to the Air Training Command Headquarters (San Antonio). [Rep. Tr. 2432.]

Additionally, the adjacent Air Force Base at Indian Springs, Nevada was apprised of simulated instrument-

approach training at Nellis Air Force Base as indicated on Exhibits U-22, U-23, and U-24.

Thus the Commander of Nellis Air Force Base fully disseminated flight information pursuant to AFR 55-19.

The promulgation of Wing Supplement-1 by the Commanding General of Nellis Air Force Base is precisely the exercise of a discretionary function or duty which the Supreme Court had in mind in *Dalehite v. U. S.*, 346 U. S. 15, when the Court said (pp. 35-36):

> "It is enough to hold, as we do, that the 'discretionary function or duty' that cannot form a basis for suit under the Tort Claims Act includes more than the initiation of programs and activities. *It also includes determinations made by executives or administrators in establishing plans, specifications, or schedules of operations. Where there is room for policy judgment and decision there is discretion.* It necessarily follows that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable. If it were not so, the protection of §2680(a) would fail at the time when it would be needed, that is, when a subordinate performs or fails to perform a causal step, each action or nonaction being directed by the superior, exercising, perhaps abusing, discretion." (Emphasis added.)

The inherent error of Finding No. 67 is viewed in bold relief when read in chronological order following AFR 55-19 (Appendix B) and flying training Air Force, Regulation 51-34. [Rep. Tr. 1833-1839.]

Briefly stated, the Secretary of the Air Force in AFR 55-19 *ordered* Nellis Command to segregate the

airspace in which simulated instrument-approach training was to be conducted under VFR conditions. The Air Training Command *ordered* Nellis Command to train pilots in simulated instrument-approach training under VFR conditions. Nellis Command complied with both orders by adapting to local commercial radio station KRAM the standardized teardrop-pattern instrument-approach-training procedure, and scheduling internally controlled training operations thereon.

Finally the trial court upon consideration of the alternatives available to Nellis Command when it adapted the standard instrument-approach-training procedure to radio station KRAM [see the alternatives stated in FF. 60 and 61], substituted its own judgment and held in effect: "The Commanding General of Nellis Air Force Base exercised poor judgment. He did not choose the best course from the alternatives available to him."

Concerning such judgment, the Supreme Court in *Dalehite* said that the "discretion" protected by §2680(a) (p. 34):

> ". . . is the discretion of the executive or the administrator *to act according to one's judgment of the best course,* a concept of substantial historical ancestry in American law." (Emphasis added.)

Implicit in Findings 60, 61 and 67 is the acknowledgment by the trial court that the Commander of Nellis Air Force Base in fact exercised his individual judgment *or discretion.* The fact that the trial court characterized the discretion so exercised as "negligent" is simply another way of saying the discretion was abused. Applying the rule in *Dalehite,* this Court held

in *Builders Corporation of America v. United States* (C. A. 9, opinion filed August 7, 1963):

> "We think Colonel Leavitt exercised his best judgment in what he did and how he did it. But whether he did or not, whether he was negligent or not; whether he abused *his* discretion, are all immaterial. The sovereign immunity of the United States does not permit awards for damages arising out of acts performed by reason of the discretionary duty or function of 'an employee of the government.'"

It is submitted that all findings and conclusions of the trial court concerned with the establishment and continued use by Nellis Command of the instrument-approach-training procedure KRAM (the findings specified in *Group A, supra*) and characterized by the trial court as negligent acts and omissions are outside the ambit of the Tort Claims Act and within the "discretionary function" exception in §2680(a), and the trial court erred in finding to the contrary.

The Government maintains that the trial court similarly erred in those findings and conclusions concerned with the actual use or conduct of the KRAM procedure itself on and prior to the day of the mid-air collision. The Government now addresses itself to those findings previously designated as and specified in *Group B.*

Summarily stated, the findings in Group B define as negligent the manner in which Nellis Command and pilots therefrom conducted instrument-approach training on the KRAM pattern. In this regard the findings are that the Nellis Command failed to give notice of flying activity at Nellis Air Force Base, including the KRAM procedure, to United Air Lines and other

commercial users of the airways [F. 57]; that Nellis Command and the Air Force pilots involved here failed to obtain IFR clearances for the KRAM procedure or failed to obtain traffic information concerning traffic on civil airways [FF. 26, 27]; Nellis Command failed to instruct its pilots either to obtain IFR clearances or obtain traffic information concerning traffic on civil airways [FF. 29, 30]; and, finally, Nellis Command failed to obtain specific traffic information concerning commercial use of the civil airway designated Victor-8, or in general, the nature and flow of such traffic thereon. [F. 28.] It is the Government's position that all the foregoing findings of negligent acts and omissions are within the "discretionary function" exception in §2680(a).

Regarding the obtaining of IFR clearances, the Government again draws this Court's attention to the testimony of the Commanding General of Nellis Air Force Base, General McGehee. It is the uncontradicted testimony of General McGehee that, *in his judgment,* it was not feasible to obtain IFR clearances and fulfill his assigned mission. [Rep. Tr. 2531-2533.] The materiality of his testimony lies in the fact that it was within his discretion, as the commanding general, to choose one of two alternatives. When, as he testified, he rejected as not feasible the obtaining of IFR clearances, it constituted the exercise of a "discretionary function" within the meaning of §2680(a). Thus the trial court erred as to Findings 26, 27, 29, 30, 54, 66, and 69.

As a preface to what Nellis Command did, *in fact,* the Court's attention is again respectfully drawn to AFR 55-19 (Appendix C), and specifically to Para-

graph 5 thereof entitled "Control of simulated instrument flight rule (IFR approaches)." Paragraph 5 specifically imposes duties upon (a) the commander of the local flying activity; (b) the pilot engaged in simulated instrument approach training; and (c) air-traffic-control personnel at the local flying activity.

In compliance with the Order of the Secretary of the Air Force (AFR 55-19, Appendix C) enjoining him to "direct maximum use of outlying facilities in order to relieve air-traffic congestion near local navigational facilities" the Commanding General of Nellis Air Force Base in Wing Supplement-1 (Appendix D) specifically provided in Paragraph 2-A, "The area within a 25-mile radius of Nellis Air Force Base is reserved for instrument flying," and, subsequently in the same paragraph, segregated *to outlying facilities* nine (9) other types of local VFR (Visual Flight Rules) flying activities. (And see segregated areas charted on Exhibit G-45).

Regarding the duties imposed on the pilot and air-traffic control personnel by AFR 55-19, the Court's attention is respectfully drawn to Paragraph 5 of Wing Supplement-1 (Appendix D) and to Training and Operations Memorandum No. 51-8 [Ex. A [Brown Book] p. 163, Appendix E.] It will be noted upon examination of these two exhibits that Nellis Command specifically provided air-traffic control by radio *in depth of detail* between the pilot and Nellis Air Traffic Control personnel, and Nellis Command specifically *ordered* pilots to *maintain radio contact with VFR control* (Appendix E, par. 4d.).

The Government accordingly contends that the official directions issued by Nellis Command (Wing Sup-

plement-1, and Operations and Training Memorandum 51-8) to the pilot and to Nellis Traffic Control personnel demanded *strict adherence* by them to those directives. They (the directives) did not permit *any other action* by the pilot [Rep. Tr. 2714] or Nellis Air Traffic Control personnel. The fact that the trial court, in effect, found that the pilot or Nellis Air Traffic Control personnel *should* have taken other action apart from those official directions provides no ground for action against the Government. Directly in point is *Dalehite*. In that case the Court said (p. 36):

> "It necessarily follows that acts of subordinates in carrying out the operations of government *in accordance with official directions* cannot be actionable." (Emphasis added.)

The Government submits that the Air Force pilots and Nellis Traffic Control personnel were *carrying out the operations of government* (*training* is a congressionally directed Air Force mission, Title 10, U. S. C. §8062 (c), Appendix B, and as such is an operation of government) *in accordance with official directions* (Wing Supplement-1, and Training and Operations Memo. 51-8); and that those directions did not permit any deviation or departure therefrom, concerned, as they were, with the control and separation of high speed military jet aircraft in the densely utilized airspace surrounding Nellis Air Force Base.

The conclusion to be drawn from the foregoing is that all findings of the trial court in Group B (*supra*) concerned with the conduct of actual operations on the KRAM procedure constitute the exercise of a "discretionary function" by officials of the Government as

that term is defined in §2680(a), and that such functions will not ground liability of the Government under the Tort Claims Act.

II.

The District Court Erred in Finding Nellis Command Was Negligent in the Establishment and Use of KRAM and Negligent in the Manner That Operations Were Conducted Thereon.

In addition to the Government's stated position regarding its defenses based upon Title 28, §2680, the Government further contends that the establishment and use of KRAM, and the manner in which operations were conducted thereon, were *not negligent,* and the trial court erred in finding to the contrary.[1]

The findings of negligence by the trial court are in sharp contrast with the findings of the Air Force regarding the safety of the KRAM procedure. The Air Force findings in this regard are reflected in the testimony of General McGehee [Rep. Tr. 2534-9], and his testimony establishes approval of KRAM by the Air Force. His testimony reveals that there were at least two inspections per year. One was conducted annually by the Air Training Command [Rep. Tr. 2535], and at least one was conducted annually by the Inspector General of the Air Force from Norton Air Force Base. [Rep. Tr. 2537.] All inspection teams not only considered the KRAM procedure objectively but, in addition thereto, some members of the inspecting team actually flew the KRAM procedure. All inspection

[1]FF. 26-30, 47-56, 60, 61, 66-69.

teams acquiesced in its establishment and use, and in the manner that operations were conducted thereon. [Rep. Tr. 2544.] Thus, the trial court, in effect, has branded as negligent not only the Nellis Command but also the Inspector General of the Air Force and the Air Training Command.

The trial court, in Finding 71, graphically characterized the nature and extent of military flights in the air space surrounding Nellis Air Force Base, and found as a fact, which the Government does not dispute, that flying activities there had been conducted for several years prior to April 21, 1958. Further, in the same finding, the trial court points out that

> "The volume of highspeed Military jet traffic in the vicinity of Nellis Air Force Base, which encroached upon Victor 8 during the daytime hours Monday through Friday at the time of the accident and for a period of at least six years preceding the accident, was heavy and continuous."

and

> "The number of practice instrument jet penetrations at Nellis using radio facilities in or near Las Vegas averaged between 20 to 60 per day. There was such a jet penetration on an average of one every 15 minutes. Of such jet penetrations, 10 to 20 per day used KRAM."

Thus the trial court impliedly found, as a matter of simple arithmetic, that, prior to the mid-air collision involved here, the KRAM procedure had been actually used a minimum of between 21,900 and 43,800 times without any mishap.

In addition to the foregoing, Nellis Command was aware of the basic postulate of safety for *any and all* VFR flights, including flights on the KRAM procedure, and including flights in and through Victor 8 and other established airways, which was the "see and be seen" concept. This fact is underscored by General McGehee in his response to a question by the court, which is included in the following portion of this testimony:

> "Q. Now, General, based upon your experience as a pilot and a general officer in the Air Force, and based upon your experience as commanding officer at Nellis Air Force Base, can you tell us whether or not in your opinion the KRAM simulated instrument penetration which was in use and as practiced on April 21, 1958 was a safe procedure? A. I considered it a safe procedure.
>
> The Court: By that you mean safe procedure if followed?
>
> Mr. Fareed: I will adopt the court's amendment.
>
> Q. Yes, if followed?
>
> The Court: Your answer would be the same, it was a safe procedure if followed?
>
> The Witness: No sir. I don't think my answer would be the same, your Honor, because it was a safe procedure operating in VFR conditions because regardless of whether he was on a KRAM penetration or crossing the airways or any other mission, he was still operating in see and be seen conditions, so consequently he might be flying up there without following this procedure being in the same area, so I don't think you can say—I mean, my conclusion is that it was a safe procedure."

The significance of all of the foregoing is that the Nellis Command could, in the exercise of due care, reasonably rely upon:

1) Approval of the KRAM procedure, as established by the Air Force Inspector General and the Air Training Command;

2) Similar approval of the manner in which operations were actually conducted on the KRAM procedure;

3) More than 21,000 scheduled operations successfully completed with the KRAM procedure without incident;

4) Pilot vigilance demanded by the "see and be seen" concept;

as a basis for drawing the conclusion that KRAM, *per se,* was a safe procedure, and that the manner in which operations were conducted thereon was, *per se,* safe.

III.

The District Court Erred in Finding That Omissions by Officials of the Civil Aeronautics Authority Were Within the Federal Tort Claims Act and Outside the Discretionary Function Exception Thereto.

The Court found the officials of the Civil Aeronautics Authority negligent for failing to notify defendant United Air Lines of the existence and utilization of the KRAM procedure [F. 57], and for failing to issue a NOTAM regarding the KRAM procedure [F. 56,a], and in addition, found the aforesaid omissions to be within the ambit of the Federal Tort Claims Act. [F. 81.] The Government specifies such findings as error. (The Civil Aeronautics Authority as referred to herein,

refers to the Authority created by the Civil Aeronautics Act of 1938 [52 Stat. 973-1030], as amended.)

In enacting the Civil Aeronautics Act, Congress unequivocally reserved unto the United States the sole right and power to regulate air commerce.

The Act is entitled:

> "An Act to create a Civil Aeronautics Authority, and to promote the development and safety and to provide for the regulation of civil aeronautics." (52 Stat. 973.)

Dominion over the airspace is thus defined:

> "The United States of America is hereby declared to possess and exercise complete and exclusive national sovereignty in the airspace above the United States, including the airspace above all inland waters and the airspace above those portions of the adjacent marginal high seas, bays, and lakes, over which by international law or treaty or convention the United States exercises national jurisdiction." (Title 11, §1107(i) (3), 52 Stat. 1028.)

Section 452(a)[1] of Title 49 reads as follows:

> "The Administrator is authorized and directed to designate and establish such civil airways as may be required in the public interest. The Administrator is authorized, *within the limits of available appropriations* made by the Congress, (1) to acquire, establish, and improve air-navigation facilities wherever necessary; (2) to operate and maintain such air-navigation facilities; (3) to arrange

[1]Repealed as of August 23, 1958, now covered by Section 1348 of the same title.

for publication of aeronautical maps and charts necessary for the safe and efficient movement of aircraft in civil air navigation utilizing the facilities and assistance of existing agencies of the Government so far as practicable; and (4) to provide necessary facilities and personnel for the regulation and protection of air traffic. *In exercising the authority granted in this subsection, the Administrator shall give full consideration to the requirements of National Defense.*" (Emphasis added.)

Congress enjoined the Authority to designate and establish civil airways; and to otherwise and in many respects regulate and control air commerce.

It is manifest by the text of the Act that both the purpose and function of the Civil Aeronautics Authority are *regulatory* in nature, with broad legislative or rule-making potential specifically delegated to it by the Congress, having due regard for the discerning judgment of the members of the Authority.

The Government contended at the trial and contends on this appeal that the Civil Aeronautics Authority was created and exists for the primary purpose of promoting in the public interest the public right of freedom of transit in air commerce. The determinations of officials charged with the advancement of those governmental objectives, made in discharge of their duties are wholly discretionary and outside the purview of the Tort Claims Act.

It has been the traditional view of the courts of this country, long prior to the Tort Claims Act, that the decision as to whether or not regulation or control of an activity or an industry, or certain of its phases,

will be undertaken, is entirely discretionary. This is so because such decisions and the power to make them are legislative in nature. *Weightman v. The Corporation Washington,* 1 Black 39, 49 (1861). If such regulation and control are undertaken, the extent of the undertaking and the form which it should take, have been held to be equally discretionary, and no private actionable claim for damages, based on the undertaking, the lack of it, or its form, will lie. This is so because the courts have traditionally refused to question the judgments on which they are based. That Congress intended to preserve this historic legal principle in the Tort Claims Act is well summarized in *Coates v. United States,* 181 F. 2d 816, 818 (C. A. 8, 1950):

> "The Congress had a sound basis for the use of the words in the Exceptions of the Act and used them in recognition of the separation of powers among the three branches of the government and the considerations of public policy which have moved the courts to refuse to interfere with the actions of officials at all levels of the executive branch who, acting within the scope of their authority, were required to exercise discretion or judgment. As stated by Chief Justice Marshall in Marbury v. Madison, 1803, 1 Cranch 137, 170 2 L. Ed. 60, 'the province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion. Questions in their nature political, or which are, by the constitution and laws, submitted to the executive can never be made in this court'."

That the determinations (acts and omissions) of officials of a regulatory agency made in the discharge of their regulatory duties are exempt from the provisions of the Tort Claims Act is emphasized in *Weinstein v. United States,* 244 F. 2d 68, 71 (C. A. 3, 1957):

> "The legislative history of the Tort Claims Act clearly reveals that the revision of the discretionary exception was 'designed to preclude * * * *application of the act to a claim against a regulatory* agency * * *. Since the language used * * * exempts from the act claims against federal agencies growing out of their regulatory activities it is not necessary expressly to except such agencies * * * by name * * *.'[2] It is well settled that 'discretionary function' embraces regulation. Dalehite v. United States, 1953, 346 U.S. 15, footnote 21, at pages 29, 34." (Emphasis added.)

In view of the rules governing air traffic and flight promulgated by the Civil Aeronautics Board and administered by the Civil Aeronautics Authority, the findings of the trial court of omissions on the part of officials of the latter require analysis and comment.

The Government contends that the officials of the Civil Aeronautics Authority, found by the trial court to be negligent, were in fact administering a program initiated at the highest executive echelon, or planning level, of the Government, appointed by the President for the purpose of providing safety in air flight, the Civil Aeronautics Board.

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[2]The Court in a footnote cites, "Memorandum for the Use of the Committee on the Judiciary, H. of Rep. 77th Cong., 2d Sess., Explanatory of Committee Print of H. R. 5373 (Jan. 1942), p. 8.

Title 49, Section 551(a)(7) reads as follows:

> "The Board is empowered, and it shall be its duty to promote safety of flight in air commerce by prescribing and revising from time to time—
>
> . . .
>
> "(7) Air traffic rules governing the flight of, and for the navigation, protection, and identification of, aircraft, including rules as to safe altitudes of flight and rules for the prevention of collisions between aircraft, and between aircraft and land or water vehicles."

The Civil Aeronautics Board formally initiated its program for safety in air flight by promulgating, among others, Civil Air Regulations, Part 60, Air Traffic Rules [Ex. G-5]; their adoption was, hence, an act of "Discretion" within §2680(a). The Government's position in this regard is precisely equated to *Dalehite v. United States, supra.* The air-traffic rules were, in part, the initiation of a program by the Civil Aeronautics Board for safety in air flight. The *decision* to adopt such a program corresponds on a parallel level with the *decision* to institute the fertilizer-export program involved in *Dalehite.* As in *Dalehite,* it is not disputed in this case that the *decision* to implement the air-traffic rules was a discretionary act.

The decision having been made, and the program initiated, the duty of administering the program rested upon the Civil Aeronautics Authority, whose role was, perforce, *subordinate.* The Government's position again rests upon *Dalehite* insofar as *Dalehite* held that the acts of subordinates in carrying out the operations of Government in accordance with official directions can-

not be actionable, and this is particularly apparent from the evidence in this case as the Government will now demonstrate.

The Air Traffic Rules are, in truth, the "specifications" for safety in air flight, demanding rigid compliance by all users of air space. In the administration of those rules, officials of the Civil Aeronautics Authority were entirely justified in assuming that they would be *strictly observed* by United Air Lines and its pilots. *Neither* the rules themselves *nor* the circumstances surrounding the mid-air collision imposed upon officials of the Civil Aeronautics Authority *any* duty to specifically draw the attention of United Air Lines to a particular traffic pattern at Nellis Air Force Base. In fact, logic dictates the conclusion that the Air Traffic Rules negate such a duty, and the factual circumstances compel the conclusion that any expression of caution to United Air Lines and its pilots would have been ineffectual and superfluous.

The Government points generally to the Civil Air Regulations, Part 60, promulgated by the Civil Aeronautics Board [Ex. G-5], and more specifically to the "Air Traffic Rules," and Section 60.12 thereof:

> "§60.12 *Careless or reckless operation.* No person shall operate an aircraft in a careless or reckless manner so as to endanger the life or property of others.
>
> "Note: Examples of aircraft operations which may endanger the lives or property of others are:
> * * *
>
> "(c) Lack of vigilance by the pilot to observe and avoid other traffic. This includes failure of

> the pilot to clear his position prior to starting any maneuver, either on the ground or in flight; and special flight activities which require such preoccupation by the pilot with cockpit duties as would prevent adequate vigilance outside the cockpit for the purpose of collision avoidance without compensation for such reduced degree of vigilance by the use of a competent observer in the aircraft, a chase aircraft, or other equivalent arrangements."

If no other fact is gleaned from the volumes of testimony in this case, certainly one stands with crystal clarity above all others, underscored by the midair collision involved in this case. It is that the increase of air traffic in the air space above the United States, both in volume of aircraft and rates of speed, demanded *vigilance* of the pilot charged with the duty to see and avoid other aircraft which constituted a hazard to his own.

The testimony of eminently qualified Air Force General Elwood R. Quesada, formerly Special Assistant to the President for Aviation, and the first Administrator of the Federal Aviation Agency, reveals dramatically the scope of and limitations upon the "see and be seen" concept for safety in flight in the high speed jet age. [Rep. Tr. 4127-4129.] Both the air-carrier industry [Rep. Tr. 4750] and the Government recognized, albeit with grave concern, the limitations of the concept [Rep. Tr. 4127-4128; 4133] but both relied on the concept for lack of a better alternative. The full import of the concept is best described by General Quesada:

> ". . . the see and be seen concept, to us, was our primer. We recognized clearly then, as is recognized now, that *the see and be seen concept*

is the basis upon which our airspace must be used. We did not have then nor do we have now an acceptable substitute for it. The see and be seen concept is an essential element to air navigation whether you are in a military aircraft, a highly sophisticated civil aircraft or a rather unsophisticated small private plane. *It is the basis upon which the airspace is used."* [Rep. Tr. 4127; emphasis added.]

And the concept was well defined by Carl M. Christenson, Director of Flight Safety, United Air Lines [Rep. Tr. 4732]:

". . . we had reached the limit in being able to depend upon what I think was a colloquial term called 'see and be seen.' It is a kind of concept that had governed the air traffic rules of this aviation community for many, many years . . ." [Rep. Tr. 4750.]

Most significant of all, however, is the comprehensive view of the concept by the Civil Aeronautics Board set forth fully in Exhibit G-19.

The exhibit recites in part:

"The current provisions of Part 60 of the Civil Air Regulations classify all air traffic into two broad categories: (1) VFR, or that category of air traffic operating in weather conditions in which it is assumed that all pilots are able to see and avoid other aircraft, and (2) IFR, or that category of air traffic operating in weather conditions in which it is assumed that pilots are not able to see and avoid other aircraft. Weather conditions which limit the range of visibility of a pilot, therefore,

are the principal factors determining the applicability of these rules.

"The current concept of flight operations is based upon the principle that pilots shall provide their own separation when visibility conditions are such that they can see and avoid other aircraft. When visibility deteriorates to the extent that this can no longer be done, other means for providing separation must be devised. Air traffic control is established for the purpose of maintaining safe traffic separation in controlled airspace under conditions in which it is impossible for pilots to perform such functions themselves.

"In applying the principle of 'see and be seen' in the air traffic rules of Part 60, the Board, up to the present time, has dealt principally with the meteorological conditions which affect a pilot's ability to see other aircraft. For some time, however, it has become increasingly apparent that the long-established 'see and be seen' philosophy applicable to VFR flight must also take account of the extreme rates of closure which are the result of the very high speeds at which certain aircraft operate.

"Under certain circumstances, it appears that the rate of closure of very high-speed aircraft is such that the total time in which the aircraft may be visible to a pilot of another aircraft is so short that pilots cannot be expected to insure separation between aircraft irrespective of the weather conditions in which they are flying.

"It has been recognized that in the interest of safety there are certain areas of the common sys-

tem where the problem of collision avoidance inherent in high-speed operations requires the use of air traffic control separation by ground controllers even in good weather conditions.

"An air traffic control system capable of insuring positive separation for all aircraft irrespective of weather conditions in certain areas of airspace is the *ultimate* objective of comprehensive operational improvement plans currently under development by the Civil Aeronautics Administration. The establishment of the continental control area in late 1957 provided the initial regulatory basis upon which the Administrator could predicate such a system.

"While the requirement for a positive control capability has been recognized and action has been initiated to establish a system having such capacity, *it is clear that considerable development of the air traffic control machinery must be accomplished if aircraft separation in good weather as well as bad is to be effected without undue economic and operational penalty to the users of the system.* Because of the extent of the improvements required in communications, navigational aids, and other essential devices, *it is equally clear that in the major portion of the airspace over the United States such control will probably not be exercised on the basis of an area concept for some time to come.*

"While it may be said that the existence of military jet aircraft operations during the past several years has already confronted the United States with a requirement for a system of high-

> altitude, all-weather air traffic control in order to insure separation, the fact is that the techniques and machinery required for such a system have not been in existence and, accordingly, *the price for complete positive air traffic control would have been exorbitant in terms of the severe restrictions imposed on essential missions.*" (Emphasis added.)

The foregoing quotation emphasizes the admitted inability of the Civil Aeronautics Board and the Civil Aeronautics Authority to provide, under VFR conditions, for positive separation between aircraft, or positive control of airspace, at the time of the mid-air collision involved in this case. It further emphasizes the total reliance by the Board on the "see and be seen" concept as expressed in the Air Traffic Rules for safety in air flight.

The very foundation of the concept "see and be seen" is, necessarily, vigilance of the pilot. To exercise vigilance is to be vigilant. "Vigilant is defined as watchful, awake, and on the alert; *attentive to discover and avoid danger,* or to provide for safety; circumspect; cautious; wary." *Matthews v. Dudley,* 212 Cal. 58, 297 Pac. 544. (Emphasis added.) It is obvious why lack of vigilance by the pilot to see and avoid other air traffic is realistically characterized in the Flight Rule quoted above as "careless or reckless operation" of an aircraft.

It may reasonably be assumed that the rule requiring pilot vigilance was adopted by the Civil Aeronautics Board with full cognizance of conditions of dense air traffic at all major air-traffic centers, *including Las Vegas, Nevada;* it may further be reasonably assumed that the rule requiring pilot vigilance was known to all pilots of major air carriers, including United Air Lines.

The adoption and publication of the rule by the Civil Aeronautics Board requiring pilot vigilance *logically* and *necessarily* negated and precluded any and all alternative rules, practices, or customs for the reason that any such alternative would detract from the effectiveness of the rule. For example, if it became the custom or the practice that pilot vigilance be predicated upon a prior warning by the Civil Aeronautics Authority, then the Air Traffic Rules requiring pilot vigilance would become a conditional rule, *i.e.,* conditioned upon prior warning; thus a pilot need not be vigilant unless and until told to be so by the Civil Aeronautics Authority, and lack of such warning would constitute an excuse or justification for lack of vigilance. It is obvious that the Civil Aeronautics Board did not intend that its express rules should be thus diluted. Thus, reason compels the conclusion that the rule of *pilot vigilance* stood then and stands now as the bedrock cornerstone of the "see and be seen" concept of safety in flight.

The trial court held that the pilot of the United Air Lines plane negligently failed to see and avoid the Government military plane. [F. 73.] Inherent in this conclusion is the finding that the pilot of the United Air Lines plane violated the rule of pilot vigilance, or otherwise stated, that there was a *lack of vigilance* on his part.

Finding No. 57 of the trial court *in effect* found a duty rested upon the officials of the Civil Aeronautics Authority to caution United to be *more vigilant.* To be more specific, the trial court impliedly found that *lack of vigilance* of the United Air Lines pilot involved in the mid-air collision here was justified on the ground that the Government did not caution him to be more

vigilant. It is self-evident that the trial court's conclusion that first, the officials of the Civil Aeronautics Authority owed a duty to United Air Lines, and second, failed to act thereon is wholly untenable for the reason, as previously pointed out, that any such duty is logically contra-indicated by the Air Traffic Rules themselves.

The factual circumstances found by the trial court demonstrate, in addition, that the trial court's findings are *unwarranted.* Accepting, as the Government does, the Court's factual findings in Finding No. 71 concerned with the volume of high speed military air traffic in the vicinity of Nellis Air Force Base; and accepting, for purposes of argument, the truth of the conclusion reached by the Court in Finding No. 71 that "such activities constituted and created conditions which were hazardous and dangerous to the conduct of commercial flying as carried on by United Air Lines by its Flight 736 on April 21, 1958," the Court's attention is then respectfully drawn to Finding No. 72, in which the trial court found that United Air Lines had *"actual knowledge of the . . . hazards prevailing in the area."*

Indeed, there is ample evidence to support the findings of the trial court that the hazards prevailing in the area were well known to United Air Lines. Examples of testimony in this regard include the admission *that United Air Line pilots were aware of the intensity of jet traffic at Nellis Air Force Base.* [Rep. Tr. 4480.]

W. E. Larned, manager of Flight Operations of United Air Lines in Los Angeles characterized flying conditions in the vicinity of Nellis Air Force Base as one in which *the hazards of mid-air collisions were very*

grave [Rep. Tr. 4521]; and, in addition (although the Government contends the characterization was not supported by any evidence in the record), further characterized the Nellis-Las Vegas area as one in which *there appeared to be a particularly irresponsible type of military flying.* [Rep. Tr. 4522.]

United Air Lines Flight Manager E. F. Cullerton, whose duties included pilot supervision at Denver, Colorado, testified that *they were well aware of the inherent danger of the activity in the Nellis Air Force Base pattern.* [Rep. Tr. 5369.]

The foregoing graphic characterizations of Nellis Air Force Base bring into full focus the "hazards prevailing in the area," *actually known* to United Air Lines. Under such circumstances, *the rule of pilot vigilance emerges as the rule without peer,* exerting the totality of its influence upon United Air Lines pilots approaching the Nellis-Las Vegas area, and constantly admonishing them to be *on the alert* and *attentive to discover and avoid danger.* During flight through an area of *"particularly irresponsible military flying"* (United's characterization) presenting *"grave hazards of mid-air collision"* relaxation of pilot vigilance *in any degree* cannot be justified *upon any ground.*

The Government submits that the realities of the situation *did not warrant,* and the Air Traffic Rules *did not permit* the conclusions of the trial court that the officials of the Civil Aeronautics Authority "negligently and carelessly" failed to notify United Air Lines of the existence and utilization of the KRAM procedure, and that a NOTAM should have been issued in that regard.

In any event, the methods employed in the regulation of civil aeronautics by the Civil Aeronautics Board and administered by Civil Aeronautics Authority and the officials thereof are wholly outside the Tort Claims Act as a "discretionary function" as that term is used in 28 U. S. C. A. §2680(a) and defined in *Dalehite v. United States, supra.*

IV.

The District Court Lacked Jurisdiction Under 28 U. S. C. A., Section 2680(h), "Misrepresentation", to Predicate Government Liability on Negligent Failure to Inform United Air Lines of the Existence and Utilization of KRAM.

The trial court held that both the Nellis Command and officials of the Civil Aeronautics Authority were negligent for failing to give notice to United Air Lines and others of the existence and utilization of the KRAM procedure. [FF. 56, 57, and 68.] The essence of these findings is an omission to act, or, more specifically stated, a *failure to inform* under circumstances in which the trial court found a duty to do so.

Although the Government has previously in this brief pointed to specific evidence as indicative of the futility of any such notification to United Air Lines in view of their actual knowledge concerning high speed jet aircraft activity in the Las Vegas-Nellis area, the Government nonetheless submits that nondisclosure, or failure to inform, is but a facet of and included within the "misrepresentation" exception to the Tort Claims Act as set forth in 28 U. S. C. A. §2680(h).

This court has held that "misrepresentation" as used in that section (§2680(h)) includes *negligent* as well

as *intentional* misrepresentation. *Clark v. U. S.*, 218 F. 2d 446, 452 (C. A. 9, 1954).

In *National Mfg. Co. v. U. S.*, 210 F. 2d 263 (C. A. 8, 1954), cert. denied 347 U. S. 967, 74 S. Ct. 778, the court equated *failure to inform* with *negligent misrepresentation* thus (page 276):

> "Insofar as the instant claims are based on negligence in failing to inform or warn the plaintiffs that the flood was coming, we think that conduct also is within the exception of section 2680(h). That charge is in substance that the duty rested upon the employees to state or represent the imminence of the flood and that the negligent failure to make any statement had the same effect upon the plaintiffs as the alleged misinformation negligently given. *The purpose of excepting federal liability on account of negligent misrepresentation necessarily extends to negligent failure to represent* which has the same effect as an affirmative misrepresentation. The intent of the section is to except from the Act cases where mere 'talk' or failure to 'talk' on the part of a government employee is asserted as the proximate cause of damage sought to be recovered from the United States." (Emphasis added.)

Accordingly, in addition to the Government's previous contentions as to these findings [FF. 56, 57, 68], that they are within the "discretionary functions" exception (§2680(a)), the Government further contends that those findings of negligence bottomed on a "failure to inform" [FF. 56, 57, 68] are precluded by §2680(h) from grounding liability on the Tort Claims Act, and the trial court was without jurisdiction to predicate the Government's liability thereon.

V.

The District Court Erred in Finding the Government Pilots Negligently Failed to See and Avoid by Yielding the Right of Way to the United Plane, and That Said Failures Were Concurrent and Proximate Causes of the Accident.

The foregoing specification of error includes those acts of the government pilots described by the trial court in Findings 41, 65, and 73.

The Government contends that there is no substantial evidence to support the conclusion that the government pilots failed to see United's plane; and further contends that the evidence demonstrates that the Government jet was making an avoidance maneuver at the time of the accident.

There is, regrettably, no direct or positive evidence of what the instructor pilot of the government plane saw or failed to see prior to the collision. The circumstances, however, tend to show that the government instructor pilot did see United's plane. For example, the Court found that *at the time of impact* the speed brakes on the Government jet were retracted. [F. 37.] This would indicate that the brakes were retracted immediately prior to the collision to give the pilot better control for evasive action. The instructor pilot had instant control of the aircraft through a system of dual controls [Rep. Tr. 2229, F. 16] and he could retract the speed brakes in a matter of *one second.* [Rep. Tr. 3971.] Additionally, the evidence shows that the government plane was in a 90° bank at the time of impact

[Rep. Tr. 3441-2], which is a full 60° more than the 30° bank required in making the KRAM approach. [Rep. Tr. 1448-9.]

Reliable testimony in the record indicates that the rate of closure between the two aircraft was approximately 735 miles per hour [Rep. Tr. 3729], and that when the two planes were approximately one statute mile apart, they were 4.7 seconds away from the collision. [Rep. Tr. 3772.] Furthermore, the evidence shows that at that point (one statute mile apart), the scientific probabilities of the pilots' seeing each other were 50%. [Rep. Tr. 3772.] Considering a reaction time based upon Exhibit G-125 [Rep. Tr. 3656-59] of 3.5 seconds, it is entirely reasonable to assume that the government instructor pilot when within one mile and 4.7 seconds away from the collision retracted the speed brakes and rolled into a 90° bank in a last-second effort to avoid collision. The Government submits that this is the only *reasonable* inference that can be drawn from the record of testimony giving due weight to the presumption that the instructor pilot acted with due care for his own safety. The evidence therefore proves that the government pilots were not negligent.

On the other hand, there is nothing in the record to suggest that the pilot of United's plane took *any* evasive action, and it is therefore reasonable to assume that he negligently failed to see the government plane; that even a slight evasive action on his part would have avoided the collision. Pilot negligence therefore rests *entirely* with the United pilot.

VI.

The District Court Erred in Finding That the Government Plane's Speed Brakes Were Retracted and Should Have Been Extended at the Time of Impact [F. 37], and That This Was a Concurrent Proximate Cause of the Accident [FF. 82 and 83].

The trial court's finding that the military jet's speed brakes were retracted at the time of impact is based entirely upon the evidentiary fact that the brake-actuating cylinders were found in the debris in a retracted position. [Rep. Tr. 3967.] Inconclusive as this slight evidence is, retraction of the speed brakes is entirely consistent with the Government's previously stated position that the instructor pilot purposely retracted the brakes as part of an evasive maneuver before the collision. It is also entirely consistent with the testimony of Major Covault that retraction of the speed brakes *after* the collision would have been appropriate for purposes of better control and reduction in the rate of descent. [Rep. Tr. 3461-2.] Either situation would account for the retracted condition of the actuating cylinders when found.

Summarily, it may be stated that testimony in the record, *supra,* supports the proposition that retraction of the speed brakes either before or after the accident would have been an appropriate action under the circumstances. [Rep. Tr. 3462.]

The conclusion to be drawn from the foregoing is that the speed brakes were intentionally retracted in the exercise of care, and not, as the trial court found, that the speed brakes were retracted as a result of negligence or lack of care.

VII.

The District Court Erred in Two Cases in Limiting the Amount of Contribution by United Air Lines, Inc. in Favor of the Government to an Amount Not in Excess of the Jury Verdict in Each Case.

In the *Wiener* case, No. 18510 in this Court, the jury assessed damages against United Air Lines, Inc. in the sum of $46,199.19 (reduced by stipulation to $45,999.19), and the Court assessed damages against the Government in the sum of $128,429.75. A combined judgment was entered thereon. [R. 2554.]

Thereafter, in its judgment on the cross-claims of defendants, the trial court adjudged that the Government was entitled to contribution from United in an amount not to exceed $45,999.19, and that United was entitled to contribution from the Government for the amount United *pays to the plaintiff in excess of $45,999.19.* [R. *Wiener,* 2584.] In effect, the amount to which the Government was adjudged to be entitled, by way of contribution, was limited by the trial court to the amount of the jury verdict *in an entirely separate action.* The Government specifies that it was error for the trial court to so limit the Government's entitlement to contribution.

The Government submits that, since United Air Lines, Inc. is *liable* to the Government for contribution [R. 2551; Concl. Law XVII], then the *measure* of its liability is an equitable *one-half* of the Government's liability to the plaintiff. This contention finds firm

support in *George's Radio v. Capital Transit Co.,* 126 F. 2d 219, in which the Court had occasion to discuss the distinction between indemnity and contribution. The Court said (regarding contribution) that, as between persons liable for a wrong, liability is "a common burden in which the parties stand in equali juri and which in equity and good conscience should be equally borne."

The Court similarly limited the Government's entitlement to contribution in the companion cases of *Dorothy M. Weil v. United States of America, et al.,* No. 18525, here, and *Edith Wagner Trujillo v. United States of America, et al.,* No. 18526 here.

In those cases, by verdict, the jury assessed damages in favor of the parties against United thus:

Dorothy M. Weil	$1.00,
Edith Wagner Trujillo	$1.00,
Michiel O'Neil Weagley	$1.00,
Helen Trujillo	$310.25.

and entered judgment accordingly. [R. (Weil) 629.]

In the Tort Claims action by the same parties against the Government, the trial court assessed damages only in favor of Michiel O'Neil Weagley in the sum of $5,040.00, and nothing to the others listed above. [R. (Weil) 629.]

In its judgment on the cross-claims of defendants in those actions (*Weil* and *Trujillo*), the trial court adjudged that the Government was entitled to contribution from United for one-half of the amount of the

jury verdict against United which the Government paid to Dorothy M. Weil, Edith Wagner Trujillo, Michiel O'Neil Weagley, or Helen Trujillo, and further provided that United was entitled to contribution from the Government for one-half of the amount of the jury verdicts in favor of the parties and in the amounts indicated above. [R. (Weil) 633.]

Thus, the Court, in effect, adjudged that the United States, in the *Weil* and *Trujillo* cases, was entitled to contribution from United in the sum of $156.62, and United was entitled to contribution from the Government in the same amount—$156.62. One is a setoff against the other. The net result is, *in fact,* a denial of contribution in contradiction to the express Finding of the Court that *each* defendant (the Government and United) is entitled thereto. [R. 2551.]

The Government submits that, for the same reasons advanced above in the *Wiener* case, the judgments on the cross-claims of the defendants in the *Weil* and *Trujillo* cases are similarly in error.

Conclusion.

For all of the reasons stated in the premises, it is respectfully submitted that the judgments appealed from, and each of them, (1) in favor of the plaintiffs against the Government, and (2) awarding contribution to United from the Government should be reversed. If the foregoing be denied, then it is respectfully submitted that the judgments on the cross-claims

in the *Wiener* (No. 18510), *Weil* (No. 18525), and *Trujillo* (No. 18526) cases be modified to the extent that contribution between the Government and United be on a basis of equality.

Respectfully submitted,

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Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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